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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GADNER NOEL AVALOS, Defendant and Appellant.	B285384 Los Angeles County Super. Ct. No. BA435991

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas W. Sortino, Judge. Affirmed as modified with directions.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Gadner Noel Avalos of three counts of sexual intercourse or sodomy with a child 10 years or younger (Pen. Code, § 288.7, subd. (a); counts 1, 2, and 5),[1] and two counts of lewd acts on a child under the age of 14 (§ 288, subd. (a); counts 4 and 8).[2] The victim is his daughter. The trial court sentenced him to three consecutive terms of 25 years to life for counts 1, 2, and 5, plus a consecutive term of six years for count 4, and a concurrent term of six years for count 8. The court awarded defendant 870 days for actual custody credit, plus an additional 130 days conduct credit, for a total of 1,000 days credit toward his sentence.

Defendant argues there is insufficient evidence to support his convictions for counts 4, 5, and 8, and he is entitled to additional days of custody credit. We direct the court to amend the sentencing minute order and abstract of judgment to reflect defendant is entitled to 1,005 days of presentence custody credit, consisting of 874 days of credit for actual time served and 131 days of conduct credit. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

Defendant and Jamileth L. (mother) are the parents of one son and two daughters: Doe 1 born in August 2000; Doe 2 born in May 2007; and Doe 3 born in March 2008. Defendant and

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[1] All undesignated statutory references are to the Penal Code.

[2] Defendant was found not guilty of counts 3, 6, and 7. The jury also found the allegation that defendant committed a crime against more than one victim not true.

mother's relationship ended after 12 years and he moved out of their home in 2013. After defendant moved out, the children lived with mother but spent alternate weekends with defendant.

The daughters, Doe 2 and Doe 3, spent the weekend of April 11, 2015 with defendant. As was their practice, both girls slept with defendant in the same bed. Doe 2 woke up after defendant took her off the bed, put her on a lower trundle bed or on the floor, and took her pajamas off. Defendant, who was naked, began touching his penis and made Doe 2 touch his penis. Defendant then "put his private in [Doe 2's] bottom." Doe 2 felt pain while defendant was going "side to side." Doe 2 started to cry and told defendant to stop. Defendant told Doe 2 "shh" because her sister, Doe 3, might hear. Although Doe 2 tried to stop defendant, he was too strong. After Doe 2 screamed at defendant to stop, he eventually did. Defendant then "peed" on Doe 2 and told her to put her clothes back on and to wipe herself clean. Defendant also cleaned himself because, according to Doe 2, "he was all like wet." In April 2015, Doe 2 was seven—she would turn eight in May 2015.[3]

The next day, April 12, 2015, Doe 3 told Doe 2 that she was awake and saw everything that happened between defendant and Doe 2. Specifically, Doe 3 saw defendant take his clothes off and "put his private on" Doe 2.

That Monday, April 13, 2015, Doe 2 went to school. After school, Doe 2 told her brother, Doe 1, what defendant had done to her. Doe 1 testified that Doe 2 and Doe 3 told him that defendant had sex with Doe 2 on April 11. According to Doe 1, defendant ejaculated on Doe 2 although she described it as urine. After Doe

[3] At time of trial, January 2017, Doe 2 was nine.

1 told their grandmother and mother what happened to his sister, mother took Doe 2 and Doe 3 to the police station "because the girls said that their dad had sex with them."

On April 22, 2015, Nicole Farrell, a forensic specialist and therapist, interviewed Doe 2. The interview was videotaped and played to the jury. In that interview, Doe 2 described other incidents of sexual abuse by defendant. For example, she said when she was six or seven, defendant put his finger inside her vagina and moved it around in circles. Doe 2 explained that defendant's actions felt weird and hurt because he had "almost long nails and it was almost poking [her]."

DISCUSSION

1. Substantial evidence supports defendant's convictions for counts 4, 5, and 8.

Defendant contends his convictions for counts 4, 5, and 8 should be reversed because the evidence as to those counts was not specific enough, lacked corroboration, or was inconsistent. We are not persuaded.

1.1. Governing Law and Standard of Review

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314 (*Jones*).)

In child molestation cases, a witness's "generic testimony" is sufficient to sustain a conviction if the victim can "describe *the*

kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*Jones, supra*, 51 Cal.3d at p. 316.)

1.2. Evidence of Lewd Conduct as Alleged in Count 4

In count 4, defendant was charged with violating section 288, subdivision (a), by committing a lewd act upon the body of Doe 2 between May 14, 2013 and April 1, 2015. A violation of section 288, subdivision (a) requires proof of the following elements:

1. The defendant willfully touched any part of a child's body, either on the bare skin or through the clothing;

2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and

3. The child was younger than 14 years old at the time of the act.

(*People v. Martinez* (1995) 11 Cal.4th 434, 444.) In determining whether defendant acted with lewd intent, the jury was entitled to consider the other charged counts and his pattern of conduct. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1381.)

In this case, defendant argues that absent greater detail about when and where his count 4 conduct occurred, the evidence is insufficient to support the conviction for this count. We disagree. The jury heard evidence that when Doe 2 was six or seven years old, i.e., within the count 4 time period, defendant put his finger inside her vagina and moved it around in circles. And, as discussed above, Doe 2 explained that these acts by defendant felt "weird" and physically hurt her because defendant had "almost long nails and it was almost poking [her]." Doe 2 also said this happened "two times." Thus, Doe 2 described the acts committed (defendant touched her vagina with his finger), the number of acts committed (twice), and the general time period (when she was six or seven). "Additional details regarding the time, place or circumstance … are not essential to sustain a conviction [for count 4]." (*Jones, supra*, 51 Cal.3d at p. 316.)

We also reject defendant's contention that absent greater detail about when and where his count 4 conduct occurred, the jury could not differentiate that conduct from the conduct alleged in counts 1 and 2. When describing defendant's conduct as to counts 1 and 2, Doe 2 never described defendant digitally penetrating her and almost scratching her with his fingers. Instead, count 1 involved a violation of section 288.7[4] based on

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[4] Section 288.7, subdivision (a), provides that "[a]ny person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." The court gave a version of CALCRIM No. 1127 that set forth the elements of this statute and defined sexual intercourse and sodomy as penetration of the vagina, genitalia, or anus by the penis. A conviction for sexual intercourse under this statute requires proof that a defendant penetrated the child's labia majora, not her vagina. (See

defendant inserting his *penis* inside Doe 2's "private" after he sat her down on top of a laundry machine. And in contrast to defendant's count 4 conduct, Doe 2 could not remember her exact age when the count 1 conduct took place. As for defendant's count 2 conduct, also involving a violation of section 288.7, Doe 2 testified the conduct took place in the shower when she was eight years old. Doe 2 described how she was showering with defendant when he had her sit down on his *penis* after spreading her legs.

1.2.1. Evidence of Lewd Conduct and Sexual Intercourse or Sodomy on April 11, 2015, as alleged in Counts 5 and 8

In count 5, defendant was charged with violating section 288.7, subdivision (a), by engaging in sexual intercourse or sodomy with Doe 2 on April 11, 2015. In count 8, defendant was charged with violating section 288, subdivision (a), by committing a lewd act upon the body of Doe 2 on April 11, 2015. Defendant argues that insufficient evidence supports his convictions for those counts because Doe 2's recollection of what happened on this day was not corroborated by physical evidence and her description of the incident was inconsistent.

In evaluating this argument, we ask whether the record contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) We

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People v. Dunn (2012) 205 Cal.App.4th 1086, 1097.) And a conviction for sodomy "requires penetration past the buttocks and into the perianal area but does not require penetration beyond the perianal folds or anal margin." (*People v. Paz* (2017) 10 Cal.App.5th 1023, 1038.)

conclude substantial evidence in the record supports each of the two counts because, as set forth above, Doe 1, Doe 2, and Doe 3 testified to the sexual conduct underlying counts 5 and 8. For example, as to count 5, Doe 2 testified that defendant put his penis in her bottom, went side to side, and then "peed" on her. As for count 8, the jury heard evidence that defendant made Doe 2 touch his penis before sexual intercourse. And, to the extent that the count 8 conduct could be based on defendant touching Doe 2's vagina, as opposed to having her touch his penis, the jury was given the unanimity instruction—CALCRIM No. 3501—as to that count.

We also reject defendant's contention that his convictions for these counts should be reversed because Doe 2's account was not corroborated by physical evidence. For more than a century it has been the law that "[i]n California[,] conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix." (*People v. Poggi* (1988) 45 Cal.3d 306, 326; *People v. Gammage* (1992) 2 Cal.4th 693, 700, citing *People v. Akey* (1912) 163 Cal. 54; see also *People v. Harlan* (1990) 222 Cal.App.3d 439, 454 (*Harlan*) [California law does not require corroboration of the testimony of a child sexual abuse victim].) In any event, as acknowledged by defendant, his semen was found on Doe 2's underwear. And, according to a nurse practitioner who examined Doe 2 shortly after April 11, penetration of the labia, as opposed to penetration into the vaginal canal of a prepubescent child, could cause pain without leaving evidence of physical trauma.

Finally, we reject defendant's contention that Doe 2's "inconsistent contemporaneous recollections to different interviewers" of what occurred on April 11 undermine the sufficiency of the evidence supporting count 5. While the evidence

was in conflict as to whether defendant had penetrated Doe 2's anus or her vagina, confusion or inability to articulate the details of the incidents in question by a seven-year-old victim goes to her credibility, not to the sufficiency of the evidence. (*Harlan*, *supra*, 222 Cal.App.3d at p. 454.) And although we must ensure the evidence is reasonable, credible, and of solid value, it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*Jones, supra*, 51 Cal.3d at p. 314.)

2. Correction of Presentence Credit

Defendant and the People agree the court miscalculated defendant's actual and conduct credit. They are correct.

Section 2900.5 provides that defendants are to be given credit against their term of imprisonment for time spent in custody from the day of arrest to the day of sentencing. (§ 2900.5, subd. (a).) And under section 2933.1, defendants accrue worktime credit not to exceed 15 percent of the actual period of confinement, rounded downward to the nearest whole number. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815–816.) Since defendant was in custody continuously from the date of his arrest on April 24, 2015, to the date of his sentencing on September 13, 2017, his actual time in presentence custody is 874 days. Fifteen percent of 874 is 131. Defendant is, therefore, entitled to four additional days of presentence credit and one additional day of conduct credit.

DISPOSITION

The court is directed to amend the sentencing minute order and abstract of judgment to reflect actual custody credit of 874 days and conduct credit of 131 days, for a total of 1,005 days of credit. As modified, the judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.